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Contracting on the Web: Collegiate Athletes and Sports Agents Confront a New Hurdle in Closing the Deal

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CONTRACTING ON THE WEB: COLLEGIATE ATHLETES AND SPORTS AGENTS CONFRONT A NEW HURDLE IN CLOSING THE DEAL

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I. INTRODUCTION

The role of intercollegiate athletics at colleges and universities has undergone a dramatic change since the inception of the National Collegiate Athletic Association ("NCAA") in 1906,[1] generating millions of dollars in revenue for universities.[2] At the same time, the widespread use of computers – in businesses, schools, homes and government – and the explosive growth of the Internet and the World Wide Web has generated new and challenging legal issues. *The National Law Journal*, in a September 23, 1996 editorial, stated that "'netizens' are everywhere and nowhere" and recommended the adoption of "cyber-rules" to cope with the novel procedural issues spawned by the digital domain.[3] One such new issue is drafting and enforcing contracts made over the Internet.

If a sports agent were to draft a contract with a student-athlete over the Internet, which court would have jurisdiction over any controversies arising out of that contract? Does the NCAA have any regulations regarding student-athletes contracting over the Internet?

This Article examines the challenges facing sports agents and collegiate athletes when contracting over the Internet. Part II gives

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1. *See The History of the NCAA*, *at* http://www.ncaa.org/about/history.html (last visited Mar. 19, 2001) (detailing historical development of NCAA).

2. *See* Kyle Parks, *Marketing Madness Series: The Final Four: St. Petersburg*, ST. PETERSBURG TIMES, Mar. 28, 1999, at 1B; *see also* Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14 ANTITRUST 46, 47 (2000) (describing top-level college football player who generated over $2 million for university over four-year period).

3. *Cyber-Rules Needed*, NAT'L L.J., Sept. 23, 1996, at A18 (discussing Internet's transformation of procedural issues in law and calling for uniform set of rules affecting Internet).

a brief introduction to the services a sports agent provides to an athlete.[4] Part III discusses traditional personal jurisdiction, followed by the developing issues that have arisen in this area with the creation of the Internet.[5] Part IV discusses traditional contract law, followed by the unique issues that arise with contracting on the Internet.[6] Thereafter, this Article discusses new legislation that is designed to tackle the problems created by contracting over the Internet.[7] Part V discusses how sports agents and student-athletes who contract over the Internet will be impacted by the NCAA rules.[8]

II. SPORTS AGENTS

Many athletes find the retention of an agent helpful for the purposes of negotiating contracts, overseeing money management and soliciting endorsement deals.[9] The first true sports agent began his career in 1965.[10] Most notably, the sports agent negotiates a client's contract with his or her professional team. The relationship between the sports agent and the athlete imposes a duty of loyalty, good faith and fair dealing on the agent.[11] In return for the

4. For a further discussion regarding the services that a sports agent provides, see *infra* notes 9–17 and accompanying text.

5. For a further discussion concerning personal jurisdiction, see *infra* notes 18–77 and accompanying text.

6. For a further discussion regarding traditional contract law and contracting on the Internet, see *infra* notes 78–116 and accompanying text.

7. For a further discussion of new legislation discussing the Internet, see *infra* notes 117–59 and accompanying text.

8. For a further discussion describing the NCAA's regulations for sports agents and student-athletes contracting, see *infra* notes 160–76 and accompanying text.

9. *See* ROBERT M. JARVIS & PHYLLIS COLEMAN, SPORTS LAW CASES AND MATERIALS 443 (1999).

10. *See id.* at 461 (acknowledging Bob Wolf as first sports agent who began his career by representing Boston Red Sox pitcher Earl Wilson).

> One of the best-known stories about the early days of sports agency involved Green Bay Packers All-Pro center Jim Ringo. When Ringo's agent called on Packers coach Vince Lombardi to begin negotiating a contract for the 1964 season, he was asked to wait. A few minutes later, Lombardi returned and announced, "You've come to the wrong place. Mr. Ringo is no longer employed by the Packers. He now works for the Philadelphia Eagles."

Id.

11. *See* Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542, 547 (E.D. Mich. 1984) (citing Anderson v. Griffith, 501 S.W.2d 695, 700 (Tex. Civ. App. 1973)). The agent cannot have a personal interest at stake that conflicts with his client's interest in a transaction. *See id.* (finding that there is violation of that duty when agent deals on his client's behalf with third party in which agent has interest, like partnership in which agent is member). For a further discussion of the impact of sports agents, see Stephen W. Zucker, *Sports Negotiations: The Art of the Contract*, 7

services that the sports agent provides to the athlete, the agent takes a percentage of the athlete's salary and bonuses.[12]

Each of the different professional sports leagues and the NCAA regulate the activities of sports agents, but in varying degrees.[13] The National Football League Players Association, for example, requires that an agent pass an open book examination before the agents are permitted to represent any players in the National Football League.[14] The NCAA strictly prohibits contracts between student-athletes and sports agents.[15] If a contract is made between a student-athlete and a sports agent, the student-athlete loses all of his or her remaining NCAA eligibility during the athlete's college tenure.[16] Finally, sports agents who are lawyers must abide by their state bar rules of professional conduct.[17]

As the Internet increases in popularity as a respected form of communication, sports agents face many new hurdles in making contracts with athletes over this new medium. One such question is which law applies when a sports agent is contracting with a student-athlete over the Internet. For example, if a sports agent is sitting in his or her main office in New York City and the e-mail server is located in San Francisco, what state has jurisdiction if a dispute occurs? New York or California?

III. PERSONAL JURISDICTION AND THE INTERNET

A. Traditional Personal Jurisdiction

1. *Federal Rules of Civil Procedure*

Federal courts are guided by the Federal Rules of Civil Procedure and Supreme Court precedent in establishing personal juris-

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DEPAUL-LCA J. ART & ENT. L. & POL'Y 194 (1997). *See also* Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. MIAMI ENT. & SPORTS L. REV. 165 (1993).

12. *See* JARVIS & COLEMAN, *supra* note 9, at 462 (noting that amount of commission varies depending on sport and agent and is determined by sports agent's contract with client).

13. *See id.* at 478-502.

14. *See id.* at 502. Each professional sports league has its own certification requirements that an agent must fulfill before obtaining the ability to negotiate contracts on behalf of his or her client with the teams in that particular sport. For a further discussion of agent certification programs, see Gary P. Konn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 6 ENT. & SPORTS L. 1 (1988).

15. For a further discussion of the NCAA rules, see *infra* notes 160-76 and accompanying text.

16. *See* JARVIS & COLEMAN, *supra* note 9, at 502.

17. *See id.*

diction.[18] In certain cases, a federal court must examine the long-arm statute of the state in which it resides to determine if personal jurisdiction is proper.[19] If a case does not meet the requirements of the state long-arm statute, then the court cannot exercise personal jurisdiction over the matter.[20] If the case does fall within the state long-arm statute, then the federal court must determine whether exercising personal jurisdiction is proper under the Due Process Clause of the Fourteenth Amendment.[21]

The Supreme Court of the United States distinguishes between general and specific personal jurisdiction.[22] General jurisdiction occurs "when the cause of action does not arise out of or relate to the foreign [defendant's] activities in the forum."[23] The defendant must have had "continuous and systematic" contacts with the forum state for a court to exercise general jurisdiction.[24] Specific jurisdic-

18. *See* FED. R. CIV. P. 4(e)(1) (authorizing service upon individual in any judicial district "pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State"). Service of summons will establish personal jurisdiction over the defendant "who would be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . ." FED. R. CIV. P. 4(k)(1)(A).

19. *See* FED. R. CIV. P. 4(e)(1) (authorizing courts to exercise personal jurisdiction pursuant to state long-arm statute); Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987) (noting that state long-arm statutes determine applicability of personal jurisdiction). Many state long-arm statutes extend personal jurisdiction to the limits of the United States Constitution. *See, e.g.*, ARK. CODE ANN. § 16-4-101(B) (Michie 1997) (extending personal jurisdiction to limits of United States Constitution); CAL. CIV. PROC. CODE § 410.10 (West 1999) (same); 735 ILL. COMP. STAT. 5/2-209(c) (1999) (same); 42 PA. CONS. STAT. ANN. § 5322(b) (West 1998) (same). A few states, however, do not extend personal jurisdiction to the limits of the Constitution. *See, e.g.*, N.Y. C.P.L.R. 302a (McKinney 1999) (limiting exercise of personal jurisdiction with four factors).

20. *See, e.g.*, FED. R. CIV. P. 4(e)(1) (allowing courts to utilize state long-arm statutes in order to exercise personal jurisdiction).

21. *See, e.g.*, Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999) (describing two-step analysis in which federal courts must engage when deciding whether personal jurisdiction is proper); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (recognizing that even if personal jurisdiction were proper under New York Long-Arm Statute it must also comply with due process).

22. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-19 (1984) (using specific standards to determine whether case fell under specific or general jurisdiction).

23. *Id.* at 414.

24. *See id.* at 415-16. In *Helicopteros*, the Court found that the defendant's contacts with Texas were not "continuous and systematic" enough to justify general jurisdiction. *See id.* at 416. The defendant had sent its Chief Executive Officer to Texas for one negotiation session, accepted checks drawn on a Texas bank, bought equipment in and sent pilots to Texas for training. *See id.* (describing defendant's contacts with Texas). Plaintiffs generally have had difficulty proving that defendants' forum contacts satisfied the systematic and continuous standard of general

tion occurs when the cause of action arises directly from or relates to the nonresident defendant's contacts with the forum.[25]

2. *Supreme Court's Limitations Upon Personal Jurisdiction*

The Due Process Clause of the Fourteenth Amendment limits a state's power to exercise personal jurisdiction over a nonresident defendant.[26] Grounded in the Due Process Clause, the Supreme Court has ruled that personal jurisdiction is proper if a defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[27] In deciding whether it can exercise personal jurisdiction over a nonresident defendant, a court must analyze: (1) whether the defendant has sufficient minimum contacts with the forum; and (2) if sufficient minimum contacts exist, whether the exercise of personal jurisdiction comports with "fair play and substantial justice."[28]

a. Minimum Contacts With the Forum

To conclude that a defendant has sufficient minimum contacts with the forum, a court must find that the defendant could "reason-

jurisdiction. *See* Surgical Laser Techs., Inc. v. C.R. Bard, Inc., 921 F. Supp. 281, 284 (E.D. Pa. 1996) (stating that *Helicopteros* illustrates difficulty of satisfying continuous and systematic standard).

25. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (describing specific jurisdiction); *Helicopteros*, 466 U.S. at 414 (defining specific jurisdiction).

26. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (holding that states have sovereignty and exclusive jurisdiction over people within their territories but cannot exercise these powers over people outside their territories); *see also Helicopteros*, 466 U.S. at 413-14 (noting purpose of Due Process Clause in personal jurisdiction context); Kulko v. Superior Court, 436 U.S. 84, 91 (1978) ("The Due Process Clause . . . operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interest[s] of nonresident defendants.").

27. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In *International Shoe*, the Supreme Court affirmed the Supreme Court of Washington's ruling that personal jurisdiction was proper. *See id.* at 320-22. The defendant employed eleven to thirteen salespeople to sell shoes in Washington. *See id.* at 313-14. The salespeople showed samples, took orders and transmitted these orders to the defendant's headquarters in Missouri. *See id.* (detailing job duties of salespeople). The shoes were then shipped into Washington from locations outside of Washington. *See id.* at 314. The state of Washington sued the defendant to collect overdue contributions to a state unemployment fund. *See id.* at 311-12. The Supreme Court found that the defendant had "systematic and continuous" contacts with Washington. *See id.* at 320 (finding defendant's contacts "were neither irregular nor casual"). Because the defendant had exercised the privilege of conducting business within Washington, the defendant was also bound by the obligations of acting in that state, namely making payments to the unemployment fund. *See id.* at 319-20. Therefore, the exercise of personal jurisdiction over the defendant was proper. *See id.* at 321.

28. *See id.* at 319-20.

ably anticipate being haled into court there."[29] A defendant can anticipate being haled into a forum state's court if it has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[30] The Supreme Court has determined purposeful availment when a defendant entered into a contract and negotiations in the forum state,[31] sold magazines across the nation including the forum state,[32] and maintained a sales force in the forum state.[33] It remains unclear, however, whether entering a product into the stream of commerce subjects a defendant to personal jurisdiction.[34]

29. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); *see also* Calder v. Jones, 465 U.S. 783, 789-91 (1984) (holding that California could exercise personal jurisdiction over National Enquirer editor and writer because: (1) defendants could have anticipated being haled into court in California; (2) defendants wrote article causing harm in forum; and (3) newspaper had largest circulation in that forum); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (deciding that personal jurisdiction in New Hampshire was proper because defendant had "continuously and deliberately exploited" forum market and could have reasonably anticipated being haled into that court for libel). *But see Kulko*, 436 U.S. at 97-98 (refusing to find personal jurisdiction over nonresident father who had allowed his children to move to California because father could not have anticipated being haled into court in California).

The "reasonably anticipate being haled into court" standard is stronger than mere foreseeability of injury. *See Burger King*, 471 U.S. at 474. *World-Wide Volkswagen* established that foreseeability alone is not enough for jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 295-99 (rejecting plaintiff's argument that personal jurisdiction was proper in Oklahoma because it was foreseeable that car could cause injury there). In that case, it was argued that it was foreseeable that the defendants' car could end up in a car accident in Oklahoma. *See id.* at 295. The Court also discussed *Kulko*, in which it was also found foreseeable that a divorced wife would live in California and that her daughter would move there to be with her. *See id.* at 296. The Supreme Court, however, refused to find that California had personal jurisdiction over the ex-husband who lived in New York. *See id.* (discussing *Kulko*'s facts and holding). In *World-Wide Volkswagen*, the Court refused to exercise personal jurisdiction over the retailer and wholesaler because they had not purposefully availed themselves of conducting business in Oklahoma; it was a "fortuitous circumstance" that the car was involved in an accident in Oklahoma. *See id.* at 295-99.

30. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). As the Court pointed out in *Burger King*, requiring purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated,' contacts." *Burger King*, 471 U.S. at 475 (quoting *Keeton*, 465 U.S. at 774).

31. *See Burger King*, 471 U.S. at 478-87 (holding that defendant was subject to personal jurisdiction in Florida because he had negotiated and entered into contract containing Florida choice-of-law provision).

32. *See Keeton*, 465 U.S. at 73-74 (holding that defendant's "regular circulation of magazines in the forum State [was] sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine").

33. *See Int'l Shoe*, 326 U.S. at 320-22 (concluding that defendant's business activities in Washington were sufficient for personal jurisdiction).

34. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-13 (1987) (plurality opinion) (addressing stream of commerce theory). In *Asahi*, the peti-

In cases involving tortious conduct, the Supreme Court created an "effects test" to determine whether the forum state can exercise personal jurisdiction.[35] Under the effects test, courts have exercised personal jurisdiction over nonresident defendants when the forum state was the "focal point" of the plaintiff's injury.[36] The Supreme Court held in *Calder v. Jones*[37] that California could exercise personal jurisdiction over the defendants because "their intentional, and allegedly tortious, actions were expressly aimed at California."[38]

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tioner was a Japanese manufacturer of tire valve assemblies. *See id.* at 106. These valve assemblies were sold to a number of companies including Cheng Shin, a Taiwanese corporation, which used these assemblies in tires shipped all over the world. *See id.* After Cheng Shin was sued in California for damages relating to the blowout of a tire, Cheng Shin attempted to indemnify Asahi. *See id.* The California Supreme Court found that personal jurisdiction over Asahi was proper because the company was aware that its valve assemblies could end up in California. *See id.* at 108. The United States Supreme Court reversed, however, finding that California could not exercise personal jurisdiction over Asahi. *See id.*

Although all of the Justices agreed that the exercise of personal jurisdiction in California was improper under the reasonableness prong of the *International Shoe* test, the Justices were split on whether Asahi had sufficient minimum contacts with California. *See id.* at 105 (giving breakdown of Justices' votes). Justice O'Connor, Chief Justice Rehnquist, Justice Powell and Justice Scalia found that Asahi's "placement of a product into the stream of commerce, without more, [was] not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. Justices Brennan, White, Marshall and Blackmun, however, concluded that Asahi had purposefully availed itself of the privilege of conducting business in California. *See id.* at 116-21. Finally, Justice Stevens believed it was unnecessary to consider the stream of commerce theory because the exercise of personal jurisdiction was unreasonable. *See id.* at 121-22 (stating that minimum contacts analysis was unnecessary, and even if it were required, there were probably enough contacts to constitute purposeful availment).

35. *See* Calder v. Jones, 465 U.S. 783, 788-91 (1984) (discussing effects test). In *Calder*, the National Enquirer published an allegedly libelous story about entertainer Shirley Jones. *See id.* at 784. The plaintiff sued the Florida-based publication in California. *See id.* The petitioners, an editor (who resided in Florida and traveled frequently to California) and writer (who resided in Florida and prior to the lawsuit had only visited California twice), moved to have the suit dismissed for lack of personal jurisdiction. *See id.* at 784-86. The Supreme Court, however, held that California could exercise personal jurisdiction over both defendants. *See id.* at 788-89. Because the plaintiff's career was based in California, she suffered most of the damage from the defendants' story there. *See id.* at 789 (concluding California was "focal point both of the story and of the harm suffered"). Furthermore, the defendants used California sources to research and write the story. *See id.* California's exercise of personal jurisdiction over the defendants was proper because "their intentional conduct in Florida [was] calculated to cause injury . . . in California." *Id.* at 791. Because the defendants knew that the plaintiff would suffer most of the harm in California, they could reasonably anticipate being haled into court there. *See id.* at 789-90.

36. *See id.* at 789. The defendants were subject to personal jurisdiction in California because the plaintiff felt the effects of their conduct there. *See id.*

37. 465 U.S. 783 (1984).

38. *Id.* at 789.

b. Fair Play and Substantial Justice

A court must determine whether the exercise of personal jurisdiction would be reasonable even if a defendant has sufficient minimum contacts with the forum.[39] In deciding whether the exercise of personal jurisdiction was reasonable, courts have considered: (1) the burden on the defendant; (2) the forum state's interest in protecting its residents; (3) the plaintiff's interest in obtaining convenient relief; (4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (5) the state's interest "in furthering substantive social policies."[40] If these factors are particularly strong, lesser minimum contacts may support personal jurisdiction.[41]

B. Establishing Electronic Personal Jurisdiction

To understand the growing legal issues surrounding electronic personal jurisdiction and how they affect contracting on the Internet, it is important to have a "clear understanding of the exponentially growing, worldwide medium that is the Internet."[42] The United States Court of Appeals for the District of Columbia has described the Internet as "a global network that links smaller networks of computers."[43] The Internet is a "network of networks," without

39. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that personal jurisdiction cannot violate fair play and substantial justice).

40. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion) (setting forth factors to consider in deciding whether exercise of personal jurisdiction would be reasonable); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (discussing reasonableness factors for personal jurisdiction).

41. *See Burger King*, 471 U.S. at 477 (noting that strong factors in favor of personal jurisdiction may compensate for lesser minimum contacts).

42. Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (noting need to have knowledge of creation of Internet before tackling new First Amendment and due process jurisprudence).

43. United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998) (describing relationship between Internet and Internet browsers). The Eastern District of Pennsylvania characterized the Internet as "a giant network which interconnects innumerable smaller groups of linked computer networks." *See Reno*, 929 F. Supp. at 830. The Internet is comprised of computers or computer networks that are owned by governmental and public institutions or non-profit or privately owned organizations. *Reno*, 929 F. Supp. at 831. As a result of the ensuing network, the Internet is a "decentralized, global medium of communications – or 'cyberspace' – that links people, institutions, corporations, and governments around the world." *Id.* The Internet, originating in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA"), was initially called ARPANET. *See id.* The network connected computers owned by the military, defense contractors and university laboratories that were conducting defense related research. *See id.* The ARPANET later allowed researchers across the country to access and use the pow-

any main focal point or centralized location.[44] Users can communicate and distribute information over the Internet in a variety of ways including by email, Usenet discussion groups, real time chat (Internet Relay Chat) and the World Wide Web.[45]

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erful supercomputers located in a few important universities and laboratories. *See id.*

From its inception, the Internet was "designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable." *Id.* Even if a major catastrophe damaged a portion of the network, this redundant system of linked computers would allow vital research and communications to continue. *See id.* A message sent over the network could travel over a number of different routes to its destination; thus, a communication is transmitted through a number of interconnected computers. *See id.* at 831-32. Communications that travel over the Internet are even transmitted in broken pieces. *See id.* at 832. The Internet uses "packet switching," a communication protocol that sub-divides a message into smaller "packets" that are then sent independently to the receiving computer, which reassembles the message once all of the "packets" are received. *See id.* While ARPANET was evolving, similar networks such as BITNET, CSNET, FIDONET and USENET were developed to link businesses, research facilities, individuals and universities. *See id.* Over time, each of these networks linked together connecting computers and computer networks eventually creating the series of networked computers referred to as the Internet. *See id.*

44. *See id.* at 830-32 (discussing decentralized development of Internet).

45. *See id.* at 834-38 (discussing methods of communicating on Internet). Through e-mail, a person can communicate directly with one or several people with Internet access. *See id.* at 834.

Listservs are automatic mailing list services organized around particular topics such as opera, children's literature or German. *See id.* at 834. To join a particular listserv, a person must subscribe to that listserv by e-mail. *See id.* After subscribing to the listserv, a person will receive e-mails from other members of that listserv. *See id.* To respond to an e-mail, the recipient sends an e-mail to the listserv, which is then automatically distributed to the other members. *See id.* (Usually a computer does this but some listservs are moderated by a person who will read and then only e-mail select messages). *See id.* Listservs that are run by computers are "open" and can be joined automatically while "closed" listservs are run by human moderators who may limit the number of subscribers. *See id.*

Like listservs, Usenet groups are organized around topics (such as job opportunities in New Jersey, Babylon 5 or Sikhism). *See id.* at 834-35. Today there are over forty-five thousand Usenet groups generating half a million postings a day. *See* Katie Hafner, *Old Newsgroups Marketed in New Packages*, N.Y. TIMES, June 24, 1999, at G1 (giving Usenet statistics). As of 1995, approximately twenty people used Usenet. *See id.* (stating last known number of Usenet participants). To access a particular Usenet group, a person may subscribe to that group and read other subscriber's posts. *See Reno*, 929 F. Supp. at 834-35 (providing information on joining Usenet group). On moderated newsgroups, a moderator decides which messages to post and reviews all messages. *See id.* at 835. On unmoderated groups, messages are automatically forwarded to all Usenet servers that furnish access to the group. *See id.* Unlike listserv messages, Usenet posts are not distributed to a person by e-mail. *See id.* Instead Usenet posts are disseminated to servers that temporarily store these messages and periodically purge them. *See id.* So if a person wishes to respond to someone else's post or post his or her own messages, he or she will post a message that is either sent to a moderator on a closed group or

1. *Commercial Activity Over the Internet*

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.[46] established the general framework for analyzing personal jurisdiction on the Internet. Generally, the establishment of personal jurisdiction is "directly proportionate to the nature and quality of commercial

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sent to other servers on an open group. *See id.* Usenet groups are among the most open and diverse methods of interaction on the Internet. *See* Hafner, *supra*, at G1 (calling Usenet "particularly untamed, free-flowing part of the Internet").

Internet users may also "chat" online. *See* Reno, 929 F. Supp. at 835 (providing overview of Internet chat). Through Internet Relay Chat ("IRC"), a person may communicate with one or more people who are online at the same time. *See id.* The user will type a message on his or her computer, and this message will be transmitted and displayed on the recipient's computer. *See id.* Internet Service Providers ("ISPs") such as America Online, CompuServe and Earthlink have their own "chat" systems. *See id.*

People can also view and obtain information such as text, pictures, movies and music from other computers. *See id.* at 835-36. Previously, people used telnet or file transfer protocol ("ftp") to access information on other computers. *See id.* at 835. Today, however, most people use the World Wide Web. *See id.* The Eastern District of Pennsylvania defined the World Wide Web as "a series of documents stored in different computers all over the Internet." *Id.* at 836. World Wide Web pages are created with hypertext markup language ("HTML") and then displayed on individual computers through browsers such as Netscape Communicator and Microsoft Internet Explorer using hypertext transfer protocol ("http"). *See id.* at 836. Web pages can contain music, animation and text. *See id.* Web pages also contain hypertext links, which viewers can click to visit other Web sites or download information. *See id.* at 836-37. Although individual computers may be incompatible, they can exchange information through the World Wide Web. *See id.* at 838. The World Wide Web has become increasingly popular because it is so easy to use. *See id.* at 837. Furthermore, HTML is so simple and Web pages are so inexpensive that it is fairly easy for people unfamiliar with technology to publish their own Web pages. *See id.*

46. 952 F. Supp. 1119 (W.D. Pa. 1997). In *Zippo*, the United States District Court for the Western District of Pennsylvania found that the defendant was subject to personal jurisdiction in Pennsylvania because it had sold approximately three thousand passwords to Pennsylvania residents and entered into seven contracts with Pennsylvania ISPs. *See id.* at 1125-26 (analyzing defendant's contacts within forum). The *Zippo* court described the following framework for examining personal jurisdiction on the Internet:

> This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 1124 (citations omitted).

activity that an entity conducts over the Internet."[47] If a company has clearly conducted business over the Internet with the forum state, then the forum state's exercise of personal jurisdiction is proper.[48] *CompuServe, Inc. v. Patterson*[49] is the leading example of a case where the nonresident defendant's business contacts with the forum state supported the exercise of personal jurisdiction.[50]

Courts generally have refused to exercise personal jurisdiction over a defendant when the only contact with the forum state was the posting of a passive Web site.[51] A passive Web site merely pro-

47. *Id.*

48. For a further discussion of a forum state's exercise of personal jurisdiction based upon a defendant's business contacts, see *infra* notes 49-77 and accompanying text.

49. 89 F.3d 1257 (6th Cir. 1996).

50. *See id.* In *CompuServe,* the defendant, a Texas resident, entered into a contract with the plaintiff, an Ohio corporation, to provide software. *See id.* at 1259-60. The contract stated that Ohio law would govern. *See id.* at 1260. The defendant transmitted thirty-two software files to the plaintiff, which then made these files available for downloading to subscribers. *See id.* at 1261. According to the defendant, he sold about $650 worth of software to Ohio residents. *See id.*

After the defendant complained that the plaintiff was infringing on his software trademarks, the plaintiff sought a declaratory judgment in the United States District Court for the Southern District of Ohio finding that it had not infringed on any of the defendant's trademarks. *See id.* at 1261. The district court granted the defendant's motion to dismiss for lack of personal jurisdiction. *See id.* On appeal, the United States Court of Appeals for the Sixth Circuit reversed the lower court's decision, holding that the defendant was subject to personal jurisdiction in Ohio. *See id.* at 1268-69. The Sixth Circuit found that the defendant had purposefully availed himself of the privilege of conducting business in Ohio by entering into a contract with an Ohio-based company, transmitting software to Ohio over a three year period and contacting the plaintiff by phone, mail and e-mail when he believed it was infringing on his software's trademark. *See id.* at 1264-67.

51. *See, e.g.,* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997) (holding that passive Web site did not show purposeful availment); Edberg v. Neogen Corp., 17 F. Supp. 2d 104, 115 (D. Conn. 1998) (holding that maintenance of Web site alone did not support personal jurisdiction in Connecticut); CFOs 2 Go, Inc. v. CFO 2 Go, Inc., No. CIV.A.97-4676 SL, 1998 WL 320821, at *3 (N.D. Cal. June 5, 1998) (finding that incomplete Web page was not enough for personal jurisdiction); Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d 1097, 1104-05 (N.D. Ill. 1997) (deciding that defendant's Web site did not justify personal jurisdiction in Illinois); Weber v. Jolly Hotels, 977 F. Supp. 327, 333-34 (D.N.J. 1997) (finding that defendant's Web advertising did not support personal jurisdiction); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (concluding that Web site advertisement was insufficient contact with forum for personal jurisdiction); Hearst Corp. v. Goldberger, No. 96 CIV.A. 3620, 1997 WL 97097, at *12 (S.D.N.Y. Feb. 26, 1997) (comparing defendant's Web site "to an advertisement in a national publication" that did not support personal jurisdiction); *Zippo,* 952 F. Supp. at 1124 (noting that maintenance of passive Web site did not expose nonresident defendant to personal jurisdiction); McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d 1826, 1828-29 (S.D. Cal. 1996) (recognizing that Web site alone was not enough to establish personal jurisdiction); Michel v. Rocket Eng'g Corp. No. 2-00-112-CV, 2001 WL 125926, at *12 (Tex. Ct. App. Feb.

vides information to the viewer.[52] The United States District Court for the Southern District of New York in *Bensusan Restaurant Corp. v. King*[53] held that a passive Web site did not justify the exercise of personal jurisdiction over the nonresident defendant.[54] A few courts, on the other hand, have found that the creation of a passive Web site did justify the exercise of personal jurisdiction.[55]

15, 2001) (finding that defendant's Web page was passive); Ragonese v. Rosenfeld, 722 A.2d 991, 995-96 (N.J. Super. Ct. Law Div. 1998) (characterizing defendant's Web page as passive and therefore not supporting personal jurisdiction).

52. *See Zippo*, 952 F. Supp. at 1124 (defining passive Web site).

53. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

54. *See id.* at 299-300 (holding that passive Web site did not support personal jurisdiction). In *Bensusan*, the plaintiff, who owned a New York City jazz club called "The Blue Note," sued the defendant, an owner of a Missouri club also called "The Blue Note," for infringing on his rights to the trademark "The Blue Note." *See id.* at 297. The defendant had promoted his small club on a Web page. *See id.* (describing defendant's Internet activities). The Web page provided information on the defendant's club, addresses of locations to buy tickets and a phone number to call and charge tickets. *See id.* To pick up the tickets, people had to go to the club in Columbia, Missouri. *See id.* The court refused to exercise jurisdiction over the defendant under the New York Long-Arm Statute and due process because the defendant had "done nothing to purposefully avail himself of the benefits of New York." *Id.* at 301. The court compared the defendant's creation of the Web site to placing a product in the stream of commerce, which was not enough for personal jurisdiction without something more. *See id.* Even though it was foreseeable that a New York resident might have viewed this Web site and become confused as to the relationship between the two clubs, this was not enough for personal jurisdiction. *See id.* (dismissing foreseeability as grounds for personal jurisdiction).

One commentator has pointed out that *Bensusan* offers dubious precedent because it was decided under the New York Long-Arm Statute, which is more restrictive than due process. *See* Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 577-78 (1999) (finding use of *Bensusan* for passive analysis "problematic"). Therefore, courts may distinguish Internet cases based on less restrictive state long-arm statutes from *Bensusan*. *See id.* The United States District Court for the Eastern District of Pennsylvania also recognized that *Bensusan* offered limited precedent. *See* Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 725 n.3 (E.D. Pa. 1999) (noting that *Bensusan* and *Hearst* decisions were only "instructive" because they were decided under New York Long-Arm Statute).

55. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) (holding that Web site with toll-free number subjected defendant to personal jurisdiction in Connecticut). In this case, the district court focused on the worldwide availability of the defendant's Web site. *See id.* Based on the defendant's Web site, the court concluded that the defendant had attempted to advertise in every state including Connecticut. *See id.* at 165 (recognizing that Internet is "designed to communicate with people and their businesses in every state"). The court concluded that the defendant had purposefully availed itself of acting in Connecticut because its Web site was available to the entire nation, including 10,000 Connecticut residents. *See id.* at 165.

Other courts have followed this reasoning. *See* Telco Communications v. An Apple A Day, 977 F. Supp. 404, 406-07 (E.D. Va. 1997) (following *Inset* to hold that Web site advertisement subjected defendant to personal jurisdiction in Virginia); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 4-5 (D.D.C. 1996) (suggesting that Web site with toll-free number that was always available to forum residents might

In cases where the level of Web site activity fell between a totally passive site and an active commercial site, courts have examined the amount of commercial interactivity to determine whether personal jurisdiction was proper.[56] The United States District Court for the Eastern District of Missouri in *Maritz, Inc. v. Cybergold, Inc.*[57] held that personal jurisdiction was proper since the defendant actively solicited Internet users from all over the world including the forum state, Missouri.[58] Internet users interacted

be enough to support exercise of personal jurisdiction in forum); State v. Granite Gate Resorts, Inc., No. CIV.A.6-95-7227, 1996 WL 767431, at *11 (Minn. Dist. Ct. Dec. 11, 1996) (concluding that defendant was subject to personal jurisdiction in Minnesota because it had purposefully availed itself of conducting business there when it "place[d] its ad on the Internet 24 [sic] hours, seven days a week, 365 days a year"), *aff'd*, 576 N.W.2d 747 (Minn. 1998). *But see* Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 46 (D. Mass. 1997) (expressing reservations about holdings in *Inset*, *Heroes* and *Maritz*).

56. *See Zippo*, 952 F. Supp. at 1124 (setting forth personal jurisdiction analysis for "interactive Web sites where a user can exchange information with the host computer").

57. 947 F. Supp. 1328 (E.D. Mo. 1996).

58. *See id.* at 1334 (finding that defendant had purposefully availed itself of privilege of acting in Missouri and could have anticipated being haled into court there). The defendant, based in California, had created a Web site promoting its services. *See id.* at 1330. Users could sign up on the defendant's mailing list and receive an electronic mailbox. *See id.* In signing up for a mailbox, users would specify particular areas of interest, and the defendant would then send the users advertisements that matched these interests. *See id.* The defendant planned to charge advertisers for access to these users, but the service was not operational yet. *See id.* According to the court, Missouri residents accessed this service 311 times although at least 180 times were by the plaintiff. *See id.* Because the defendant had transmitted its Web site promotion approximately 131 times to Missouri residents, the court found that the defendant had purposefully availed itself of the privilege of acting in Missouri. *See id.* at 1333 (finding that Missouri could exercise personal jurisdiction over defendant). One court, however, has characterized *Maritz* as a passive Web site case rather than an interactive site case. *See Hasbro*, 994 F. Supp. at 46 ("I have reservations about decisions such as *Inset*, *Heroes*, and *Maritz* which found that the existence of a Web site alone is enough to allow jurisdiction in any state."). *Thompson v. Handa-Lopez, Inc.* might be a better example of an interactive Web site that supported the exercise of personal jurisdiction. 998 F. Supp. 338 (W.D. Tex. 1998). In that case, the plaintiff sued the defendant in Texas for breach of contract, fraud and violations of the Texas Deceptive Trade Practices Act. *See Thompson*, 998 F. Supp. at 741. The defendant ran an Internet casino from California. *See id.* The plaintiff claimed that he had won approximately $193,728.40 through the defendant's Web site, and the defendant refused to pay this money. *See id.* The defendant attempted to escape personal jurisdiction in Texas by claiming it did not have sufficient minimum contacts with the forum. *See id.* at 743. Because the defendant's Web site had interacted continuously with the plaintiff in Texas, the court held that the exercise of personal jurisdiction was proper. *See id.* at 744 (noting that defendant "continuously interacted with the casino players, entering into contracts with them as they played the various games"). The defendant interacted with the plaintiff even more than the defendants in *Maritz* and *Inset*. *See id.* (recognizing that defendant did more on Internet than merely maintain Web site with toll-free phone number).

with the defendant's Web site by affirmatively signing onto the defendant's mailing list.[59]

2. *Additional Approaches to Analyzing Personal Jurisdiction on the Internet*

A number of courts have analyzed personal jurisdiction on the Internet under the stream of commerce theory.[60] In *Hasbro, Inc. v. Clue Computing, Inc.*,[61] the United States District Court for the District of Massachusetts stated that posting information on a Web site was "most analogous to . . . placing a product in the 'stream of commerce.'"[62] According to the court, courts may use the stream of commerce theory in order to decide whether a Web site targeted the forum state.[63] The district court ultimately concluded that the defendant was subject to personal jurisdiction in the forum because the defendant had directed its Internet advertising to the entire nation, including the forum state, and had conducted business with a forum company.[64]

Courts have also considered defendants' non-Internet, as well as Internet, contacts in deciding whether personal jurisdiction was proper. In *Blumenthal v. Drudge*,[65] for example, the district court found that personal jurisdiction was proper in the District of Columbia based upon the defendant's Internet, mail and phone contacts with forum residents.[66] The defendant's Internet activities consisted of a Web site containing District of Columbia gossip, a contract with America Online to publish this gossip and contribu-

59. *See Maritz*, 947 F. Supp. at 1329-34 (holding that defendant's interactive Web site supported personal jurisdiction).

60. *See, e.g.*, Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d 1097, 1104 (N.D. Ill. 1997) (using stream of commerce analysis to examine defendant's Internet activities); *Hasbro*, 994 F. Supp. at 42-45 (analyzing defendant's contacts under stream of commerce theory); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1362-64 (W.D. Ark. 1997) (referring to stream of commerce theory); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (comparing creation of Web site to placement of product in stream of commerce, which does not support personal jurisdiction without some additional act).

61. 994 F. Supp. 34 (D. Mass. 1997).

62. *Id.* at 42. For more specific information regarding the *Asahi* analysis, see *supra* note 34 and accompanying text.

63. *See Hasbro*, 994 F. Supp. at 42 (recommending use of *Asahi* analysis).

64. *See id.* at 44-45 (finding that defendant's Internet activity satisfied purposeful availment requirement of due process).

65. 992 F. Supp. 44 (D.D.C. 1998).

66. *See id.* at 56 (basing personal jurisdiction on defendant's activities on and off Internet). In this case, the defendant was a gossip columnist who resided in California. *See id.* at 46-47. The defendant wrote allegedly defamatory statements about the plaintiffs that appeared on America Online as well as the defendant's own Web site. *See id.* at 47-48.

tions from at least fifteen forum residents who responded to his Web site.[67] In addition to these Internet activities, the defendant had also visited the District of Columbia twice (once for an interview with C-SPAN), and mailed and phoned forum residents to obtain information.[68] The court held that the exercise of personal jurisdiction over the defendant was proper based upon all of these activities.[69]

In cases involving tortious conduct, courts have invoked the *Calder* effects test to determine whether a defendant's Internet contacts supported personal jurisdiction.[70] In *Panavision International v. Toeppen*,[71] for example, the United States Court of Appeals for the Ninth Circuit held that the defendant was subject to personal jurisdiction in California under the effects test.[72] Using the effects test, the court concluded that the defendant had purposely targeted his tortious behavior at California, and he knew that the plaintiff would suffer the most injury there.[73] Therefore, California could exercise personal jurisdiction over the defendant.

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67. *See id.* at 56-57 (describing defendant's Internet contacts).

68. *See id.* at 56 (listing defendant's non-Internet contacts with D.C.).

69. *See id.* at 56-58 (finding that defendant had sufficient minimum contacts with D.C. for exercise of personal jurisdiction).

70. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (utilizing effects test because case was "akin to a tort case"); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 729-31 (E.D. Pa. 1999) (finding that effects test did not support exercise of personal jurisdiction over defendant accused of defamation); Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413, 420-21 (D. Ariz. 1996) (using effects test to find that defendant was subject to personal jurisdiction in Arizona for defamatory comments directed to forum); Blakey v. Continental Airlines, Inc., 730 A.2d 854, 863 (N.J. Super. Ct. App. Div. 1999) (referring to effects test that did not support exercise of personal jurisdiction over defendants). *But see* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 936-37 (1998) (arguing that *Edias* misapplied effects test because defendant suffered harm in Europe and not Arizona).

71. 141 F.3d 1316 (9th Cir. 1998).

72. *See id.* at 1321-22 (exercising personal jurisdiction over nonresident defendant under effects test). In this case, the plaintiff, Panavision, accused the defendant, Dennis Toeppen, of trademark dilution. *See id.* at 1318. The defendant registered and used the plaintiff's trademarks as domain names. *See id.* at 1318-19. After the plaintiff told the defendant to stop using these trademarks, the defendant offered to sell the domain names back to the plaintiff. *See id.* at 1319. In addition, the defendant had engaged previously in "cybersquatting." *See id.* (noting that defendant had registered over 100 marks as domain names and attempted to sell at least two).

73. *See id.* at 1321-22 (using effects test to subject nonresident defendant to personal jurisdiction in California). The defendant engaged in tortious-like conduct by intentionally registering the plaintiff's trademarks as domain names and then attempting to extort money from the plaintiff for these marks. *See id.* at 1321. The plaintiff's principal place of business was California, and the defendant knew that the plaintiff would suffer the most harm there. *See id.* Therefore, under the

In order to determine what type of contact sports agents make with student-athletes, it will be important to determine what type of activity is occurring in the forum state. As already discussed, the sports agent's contact with an athlete will depend on whether the agent clearly conducted business over the Internet within the forum state,[74] whether the activity was a simple posting of a passive Web site trying to recruit athletes,[75] whether the activity falls between the notions of a totally passive Web site or an active commercial site,[76] or whether the agent's contact falls under the stream of commerce theory.[77] While sports agents need to keep how much activity they plan in a forum state, they also need to understand the intricacies of contracting over the Internet.

IV. MAKING CONTRACTS ON THE WEB

A. Traditional Contracts

The Second Restatement of Contracts defines a contract as a promise, or a set of promises, that the law will enforce or at least recognize in some way.[78] To be recognized by the law, the parties must go through a bargaining process involving the traditional offer and acceptance.[79] Another requirement for forming an enforceable contract is that both parties making the contract must intend to form a contract.[80]

According to the Restatement, there is no mutual agreement to a contract if the parties attach materially different meanings to their manifestations and if neither party knows or has reason to know of the meaning attached by the other party.[81] The parties may not realize that they attached materially different meanings until one or both of the parties attempt to perform their end of the

effects test the defendant purposefully availed himself of the privilege of acting in California. *See id.* at 1322 (rejecting defendant's argument that he had no contacts with California).

74. For a discussion of businesses clearly conducting activity over the Internet within the forum state, see *supra* notes 48-50 and accompanying text.

75. For a discussion of passive Web site activity, see *supra* notes 51-55 and accompanying text.

76. For a discussion of activity that falls between the classifications of a totally passive Web site or an active commercial site, see *supra* notes 56-59 and accompanying text.

77. For a discussion of a stream of commerce analysis, see *supra* notes 60-64 and accompanying text.

78. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1973).

79. *See* E. ALLEN FARNSWORTH, CASES AND MATERIALS ON CONTRACTS viii (1995).

80. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1973).

81. *See id.* § 20(1).

contract. At such a point, unless one of the parties knew or had reason to know of the meaning attached by the other party, the court will determine that no contract was made.[82]

An offer is defined as the manifestation of the willingness to enter into a bargain.[83] The offer must be made in a way as to justify another person in understanding that his or her agreement to the bargain will form a contract.[84] The offeror can determine what kind of response is required by the other party to constitute acceptance.[85] The offeror, for example, may require that the acceptance be made orally with affirmative words or simply by performance by the accepting party.[86]

The Restatement requires that both parties mutually assent to a contract.[87] If one party negotiated the contract in jest or as a joke, it will be enforceable unless one party reasonably could tell that the other party did not intend to make a contract.[88] In the case of *Lucy v. Zehmer*,[89] the Supreme Court of Virginia found that the actions on the part of Zehmer could not reasonably be interpreted as a joke.[90] Zehmer believed that an offer made by Lucy was

82. *See id.* The court will determine that no contract was made because the parties did not intend to bind themselves to the contract that was actually formed. *See id.* Because there was no actual agreement to the terms, there was no mutual accepted agreement because the parties believed they were contracting for two different things. *See id.*

83. *See id.* § 24.

84. *See id.* An offer can be made in any form that shows that the person making the offer is willing to enter into a contract with anyone who will agree to the terms. *See id.*

85. *See* RESTATEMENT (SECOND) OF CONTRACTS § 30(1).

86. *See id.* If the form of acceptance is not indicated in any form by the offering party, then acceptance may come by any manner and medium that is reasonable given the existing circumstances. *See id.* § 52. The language of the Restatement would seem to indicate that acceptance may be made via the Web. However, it is important to keep in mind that the drafting of the Second Restatement of Contracts preceded the Internet and the Web. *Compare* RESTATEMENT (SECOND) OF CONTRACTS, *with* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (stating that first public community Internet access began in 1986). Certainly, at the time of its drafting, the legislatures never could have imagined the number of people attempting to contract through the Web. For a further discussion concerning offer and acceptance over the Internet, see *infra* notes 104-16 and accompanying text.

87. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1).

88. *See* Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954).

89. 84 S.E.2d 516 (Va. 1954).

90. *See id.* at 521 (listing elements of transaction as evidence of sale's serious nature). The contract was written signed by Zehmer on the back of a restaurant receipt. *See id.* at 517. Lucy offered to buy Zehmer's farm for $50,000 dollars. *See id.* Zehmer thought that the offer was made as a joke and wrote out a note stating, "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for $50,000, title satisfactory to buyer." *Id.* at 517-18. This was then signed by Zehmer and his

a joke.[91] Going along with the joke, Zehmer wrote out a contract stating that he would sell his farm to Lucy for $50,000.[92] This contract was signed by both Zehmer and his wife.[93]

Lucy believed that the contract was valid and binding, and the next day he began financing the deal.[94] At trial Zehmer testified that he was drunk at the time of the negotiations and that both parties were just bluffing.[95] The court stated, "We must look to the outward expressions of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'"[96]

The court then looked at the outward manifestations made by Zehmer to determine whether a reasonable person would be able to tell that he was joking.[97] The court found convincing evidence to contradict Zehmer's testimony that he was joking and too drunk to make a contract.[98] Also, there was evidence that Zehmer wrote two agreements.[99]

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wife. *See id.* at 517. Zehmer intended for this to be a joke and not a serious contract. *See id.* at 518. Zehmer left the receipt at the restaurant, but Lucy picked it up and kept it. *See id.*

91. *See id.* (noting that offer was made at Zehmer's restaurant).

92. *See id.* at 517 (noting that Zehmer had turned down past offers for farm made by Lucy).

93. *See id.* (noting that Lucy testified that Mrs. Zehmer signed contract at her husband's request).

94. *See Lucy*, 84 S.E.2d at 521. Lucy made an arrangement with his brother for half the money, and he hired an attorney to examine the title of the land. *See id.*

95. *See id.* at 520. Zehmer's argument was that both parties knew that the negotiations were a joke, and the contract was written as part of the joke. *See id.* Zehmer stated that he never intended to sell the farm. *See id.* at 518.

96. *Id.* at 521 (quoting First Nat. Exchange Bank of Roanoke v. Roanoke Oil Co., 192 S.E. 764, 770 (Va. 1938)). The person's actions and words are judged by a reasonable person standard to determine if there was an intention to form a contract. *See Lucy*, 84 S.E.2d at 522. It is immaterial what the real but unexpressed intent the person has. *See id.*

97. *See id.* at 521-22 (noting that defendant's testimony showed that nothing was said of contract being made in jest until Lucy offered five dollars to seal deal).

98. *See id.* at 520-21. Zehmer's wife suggested that Zehmer drive Lucy home. *See id.* at 520. This, of course, suggests that Zehmer's wife did not believe that Zehmer was too drunk to drive home.

99. *See Lucy*, 84 S.E.2d at 520-21. The first agreement was only in Zehmer's name and omitted his wife's name. *See id.* at 521. The second contract was written in both of their names. *See id.* This change was made at Lucy's request. *See id.* By making the change, it showed that Zehmer had time to think about the contract and realize what was occurring. Additionally, it indicated that Lucy was serious about his offer. The change was made to ensure that the contract would be enforceable against both Zehmer and his wife. Lucy wanted to make sure that he bought the farm and that the contract was full and complete.

Furthermore, there was evidence that the parties discussed the written agreement for a long period of time before it was signed.[100] The act of discussing the agreement for a long period shows that the party is considering seriously the offer. Finally, the court looked to the fact that once Lucy took the agreement, Zehmer never asked to have the paper back.[101] The court concluded that Zehmer's outward manifestations could have been interpreted as a serious intent to form a contract by the reasonable person.[102] Because the court made this determination, the contract was found to be valid and enforceable against Zehmer.[103] As this case indicates, a person's outward manifestations are very important when it comes to determining the intent of the parties.

B. Problems with Contracting on the Web

It has been well established that Internet sales and transactions have boomed in the past several years.[104] In July 1997, the United States Government published a report that stated that people should be able to make business contracts over the Web under whatever terms they can agree upon.[105] In other words, "[B]uyers and sellers could voluntarily agree to form a contract subject to this uniform legal framework, just as parties currently choose the body of law that will be used to interpret their contract."[106] Contracting on the Web differs from traditional contracting in several ways. First, there is an absence of face-to-face negotiation over the Web.[107] The only way in which negotiations may occur over the

100. *See id.* The negotiation took over forty minutes. *See id.*

101. *See id.* Lucy's taking possession of the paper with no request or suggestion by Zehmer that it be returned was evidence that the contract was a serious business transaction rather than a joke as the Zehmers contended. *See id.*

102. *See id.* (concluding that sale was serious and made in good faith).

103. *See id.* at 522 (reversing lower court's decision and remanding case in order to require defendants' performance of contract).

104. *See* Scott S. Kokka, *Property Rights on an Intranet*, 3 J. TECH L. & POL'Y 3, 17 (1998). In the United States, the current estimate is that electronic commerce will be greater than $327 billion by the year 2002. *See id.* n.47.

105. *See* Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1273-74 (1997).

106. *Id.* at 1274-75 (quoting *Interagency Working Group on Electronic Commerce, A Framework for Global Electronic Commerce* 2 (1997), *available at* http://www.whitehouse.gov/WH/New/Commerce/about.html).

107. *See* Effross, *supra* note 105, at 1281. Contracting over the Web is similar to a store putting up an advertisement in the hope that a prospective buyer will enter the store. *See id.* at 1281-83. A consumer would surf the Internet and come to a Web site to browse merchandise or to make a purchase – this is much like a person going shopping at a local store or mall. *See id.*

Internet is via e-mail between the parties.[108] The problem with negotiating via e-mail or over the Internet in another format is that the parties are unable to read the opposing parties' body language or hear any changes in tone of voice.[109] Being unaware of these attributes is a major difference between contracting in the traditional manner than over a computer. It is much more difficult to determine a person's outward manifestations over a computer than it is in person. This could pose a problem if one party claims that he or she did not intend to form a contract or that the contract was made as a joke, and he or she was not serious about it. Additionally, it is very easy for one party to misunderstand or misinterpret the other party over the Internet.[110] Because the communications transpire through a computer, these misunderstandings may go unnoticed.[111]

Another problem that is unique to contracting over the Internet is that ordinary contracting law binds parties by a common usage of words in their locality.[112] The problem that presents itself on the Web is that parties may be negotiating or completing a transaction from different parts of the country or the world. Different usage of a term in different localities could affect drastically a party's expectation of the contract.[113]

A problem that arises concerning contracts on the Web is determining what constitutes a signature for contracts that need to be in writing.[114] Similarly, it has not been determined whether a con-

108. *See id.* at 1308. For example, in buyer/seller contracts, the buyer would send an e-mail to the seller confirming the sale of the goods. *See id.*

109. *See id.* at 1309 n.108

110. *See id.* at 1309. "To the sender's chagrin, the language of an e-mail is often taken literally rather than humorously or figuratively. One collection of advice to potential owners of commercial sites even recommends that 'if the message is very important, controversial, or confidential, . . . think twice about sending it by way of e-mail and consider the telephone or a face-to-face meeting.'" *Id.* (quoting DAVID ANGELL & BRENT HESLOP, THE ELEMENTS OF E-MAIL STYLE 13 (1994)).

111. *See id.* at 1309 n.108. People often forget that facial expressions and body language are not conveyed through e-mail. *See id.* It is important to try to limit humor and sarcasm in an attempt to make e-mails understood in the way that they are intended. *See id.*

112. *See* Effross, *supra* note 105, at 1314. This is to eliminate misunderstandings and ensure that parties have the same expectations. *See id.* at 1314 n.131.

113. *See id.* (stating, "The institution of commerce in cyberspace, however, may well lead to a redefinition of the concept of 'locality' for this purpose.").

114. *See id.* at 1338. This question of what constitutes a signed writing has recently been answered. President Clinton signed an "E-sign" bill in June 2000. For further discussion of the E-Sign bill, see *infra* notes 121-28 and accompanying text.

tract formed over the Web is considered to be "in writing."[115] It is more likely to be considered "in writing" if a copy of the transmission is saved on the computer's hard drive or if a copy of the contract was printed out and retained.[116] Other complications that may arise while contracting over the Internet include: what constitutes proper authentication, offer and acceptance; what to do when a term in the contract is unconscionable; and how to determine with whom the contract was made. These differences are just a few of the many reasons why contracts made over the Web and by e-mail cannot be regulated in the same way as traditional contracts.

C. New Legislation for Contracting on the Web

Until recently, contracting for services and goods on the Web was not regulated by any written rules, and no uniform model rules existed.[117] Within the past year, the rules for contracting on the Web and the Internet have begun to appear.[118] On June 30, 2000, President Bill Clinton signed the Electronic Signatures in Global and National Commerce Act.[119] Also, the Uniform Computer Information Transaction Act ("UCITA") could become the Uniform Commercial Code for the Internet.[120] Although these two pieces of

115. *See* Effross, *supra* note 105, at 1338. It is questionable whether contracts made via e-mail or on the Web are considered to be in writing for purposes of the statute of frauds. *See id.*

116. *See id.* The status of an e-mail as a "writing" would be increased as a matter of course if the contract was retained on the computer or printed out. *See id.*

117. *See* A. Michael Froomkin, *Article 2B as Legal Software for Electronic Contracting – Operating System or Trojan Horse?*, 13 BERKELEY TECH L.J. 1023, 1024 (1998) (focusing primarily on digital signatures).

118. Currently, the Uniform Computer Information Transaction Act is being introduced by many of the fifty states. *See UCITA Online, at* http://www.ucitaonline.com/whatsnu.html. President Bill Clinton approved the electronic signature bill on June 30, 2000, and it went into effect on October 1, 2000. *See* John S. Stolz & John D. Cromie, *The Future is . . . E-Commerce Gets a Boost with E-Sign (Two Takes): Now the Subject Turns to Security*, 10 BUS. L. TODAY 9 (2001) (describing security concerns that E-Sign presents). The bill allows consumer contracts to be made over the Web. *See id.*

119. 15 U.S.C. § 7000 (2000) (originally enacted as Pub. L. No. 106-229, 114 Stat. 464); *see also* Deb Riechman, *Clinton to Sign E-Signature Bill*, ASSOCIATED PRESS, June 30, 2000.

120. For further discussion of the Uniform Computer Information Transaction Act, see *infra* notes 129-59 and accompanying text. The E-signature bill applies "to any transaction in or affecting interstate or foreign commerce . . . ." 15 U.S.C. § 7001(a). According to section 103(d)(4) of the UCITA, the Act does not apply to "a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry." UCITA § 103(d)(4).

legislation do not affect agents' contracts on the Web, they may provide an insightful preview into how Congress and the states may regulate non-commerce contracts in the future.

1. *E-Signature Bill*

Recently, one of the major questions concerning contracting on the Web has been answered. Commercial contracts and financial documents now may be "signed" over the Internet.[121] The law requires a consumer to agree to sign contracts electronically and to consent to receive documents over the Web.[122] Companies that wish to contract via the Web need to verify that the customers have an e-mail address.[123] Companies in the field of technology are racing against each other to become the first to develop the necessary technology allowing the E-signature bill to operate to its fullest ability.[124]

This E-signature bill, known as the Electronic Signatures in Global and National Commerce Act ("E-Sign"),[125] allows a contract signed in an electronic form to be valid and fully enforceable by a court of law.[126] According to E-Sign, an electronic signature is information or data that is logically associated with an electronic record that is intended by a party to signify agreement to the contract.[127] E-Sign is one of the first uniform bills passed by Con-

121. *See Capital Watch: Online-Signature Bill Barrels Through Senate,* SEATTLE TIMES, June 17, 2000, at A4. The bill passed through the House by a vote of 426 to 4, and the bill passed through the Senate with a vote of 87 to 0. *See id.*

122. *See id.*

123. *See id.* The customers must have an e-mail address in order for the company with whom the person is contracting to send the consumer the necessary technical information.

124. The E-signature bill allows the government and consumers to complete commercial transactions over the Web.

125. 15 U.S.C. § 7001 (2000).

126. *See id.* § 7001(a)(1). The E-Sign states:

> (a) In general. Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce –
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
>
> (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

15 U.S.C. § 7001(a)(1-2).

127. *See* Bill Tracking Report, H.R. 1714, 106th Cong. § 103(2). Congress defined the term electronic "as of or relating to technology having electrical, digital, magnetic, optical, electromagnetic, or similar capabilities regardless of medium." *Id.*

gress that attempts to regulate contracting on the Internet; and in so doing, it enforces electronic signatures as though the parties signed them in ink.[128]

2. *The Uniform Computer Information Transaction Act*

There is another groundbreaking piece of legislation currently passing through state legislatures. The Uniform Computer Information Transaction Act ("UCITA") is currently progressing through the State Houses of Representatives and the State Senates for approval.[129] UCITA deals with several of the aforementioned problems that are inherent with contracting over the Internet. Some of the issues addressed by UCITA include: proof of authentication, requirements of forming a contract, offer and acceptance over the Internet and determining to whom performance of the contract is attributed.[130]

UCITA cites five purposes.[131] Its first purpose is to support and facilitate the realization of the full potential of transactions made via the computer.[132] UCITA's second purpose is to "clarify the law governing computer information transactions."[133] The third purpose is to "enable the expanding commercial practice in computer information transactions by commercial usage and agreement of the parties."[134] Fourth, the adoption of UCITA hopes to promote uniformity of law among all of the states with respect to contracting over the Web.[135] Finally, UCITA allows the "continued

128. *See* 15 U.S.C. § 7001.

129. For a further discussion of the UCITA, see *UCITA Online, supra* note 118 and accompanying text. Although once UCITA is approved, it will not apply to service contracts, but it is still useful to understand how contracts will be treated over the Web. *See id.* Section 103(d)(4) of UCITA provides that the Act does not apply to "a contract of employment of an individual, other than an individual hired as an independent contractor to create or modify computer information, unless the independent contractor is a freelancer in the news reporting industry as that term is commonly understood in that industry." *Id.* § 103(d)(4). Because a contract between an agent and an athlete is a contract of employment of an individual, such a contract would not fall within the UCITA's authority. *See id.*

130. *See generally* UCITA Table of Contents.

131. *See* UCITA § 106(a).

132. *See id.* § 106(a)(1). The UCITA does not seek to change the basic laws of traditional contracting even though the contracts are made through the computer. *See* UCITA cmt. 106(2).

133. *Id.* § 106(a)(2).

134. *Id.* § 106(a)(3).

135. *See id.* § 106(a)(4).

expansion of commercial practices in the excluded transactions through custom, usage, and agreement of the parties."[136]

A major issue covered by UCITA is authenticating an electronic contract. UCITA allows each party the ability to establish particular requirements regarding how transmitted information will be authenticated.[137] If one party desires to put the contract into writing and refuses to complete the contract over the computer, it is possible for one party to sign the contract over the Web and the other party to sign a written piece of paper.[138] Also, parties may use an electronic agent to bind them to contracts if they so choose.[139] A reason for using an electronic agent might be that one party does not have access to a computer, and another reason might be that the parties are not comfortable using a computer for any reason.[140] Proving authentication may be done "in any manner, including a showing that a party made use of information or access that could have been available only if it engaged in conduct or operations that authenticated the record or term."[141] This allows the parties to use any evidence available to prove that information was sent to them by the opposing party.[142]

An important issue UCITA discusses is the formation of contracts over the Web.[143] The Act allows a contract to be formed "in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents that recognize the existence of a contract."[144] Similar to the UCC, a contract made under UCITA that has one or more terms

136. UCITA § 106(a)(5). UCITA enables contracts to be formed over the Web that are not covered within the Act. *See id.* The regulations for these types of contracts will continue to develop as the contracting parties see fit. As more and more contracts are made over the Web, a custom and usage will develop. This will make it easier for the government to regulate contracts made through the computer that are not controlled by UCITA.

137. *See id.* § 107(c). A record or authentication is not denied legal effect or enforceability just because it is in electronic form. *See id.* § 107(a).

138. *See* UCITA cmt. 107(4). Nothing in the Act requires the parties to use the same procedure as authenticating an electronic record. *See id.* In this area, the Act provides the parties much flexibility.

139. *See* UCITA § 107(5). For the actions of the electronic agent to be binding, the agent must be selected consciously by the party. *See id.*

140. A person who decides to use an electronic agent is bound by the operations of the agent, even if the individual was unaware of or had not reviewed the agent's operations or the results of the operations. *See id.* § 107(d).

141. *Id.* § 108(a).

142. *See* UCITA cmt. 108(3). This includes, but is not limited to, the use of a digital signature. *See id.*

143. *See* UCITA §§ 201-11.

144. *Id.* § 202(a). This section of UCITA is the same as the Uniform Commercial Code. *See* UCITA cmt. 202(2).

left open is valid "if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[145]

For contracts worth $5000 or more, parties must take extra steps to ensure that the contract is enforceable.[146] This type of contract is enforceable if "the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract is in refers,"[147] or if "the agreement is a license for an agreed duration of one year or less or which may be terminated at will by the party against which the contract is asserted."[148] Failure to meet these requirements does not make the contract void; it merely makes the contract unenforceable by the court.[149]

An offer to make a contract on the Web "invites acceptance in any manner and by any medium reasonable under the circumstances."[150] Usually, an agreement to all terms of the offer or following the instructions provided in the offer constitutes acceptance.[151] If the offeror does not give instructions on how to accept an offer, then the acceptance of an offer can be performed by any reasonable manner.[152] If the offer in an electronic message requires an electronic message to accept the offer, a contract is formed when the electronic acceptance is received.[153]

If an acceptance of a contract materially alters the offer, then a contract is not formed unless the party agrees to the other party's

145. UCITA § 202(c). If the parties intend to make a binding contract even though there are terms missing, then the contract is valid and enforceable. *See* UCITA cmt. 202(4). The contract is not enforceable if there are open terms and if the parties intended for the contract to become enforceable only when the terms of the contract are completed. *See id.*

146. *See* UCITA § 201(a).

147. *Id.* § 201(a)(1). A record must indicate that a contract was formed, reasonably identify the subject of the contract and must have been authenticated by the party by which the action is being brought against. *See* UCITA cmt. 201(3)(b).

148. UCITA § 201(a)(2). This section combines the UCC and the common law. *See* UCITA cmt. 201(1). Failure to meet the requirements of this section of the Act does not make a contract invalid; it merely precludes a party from using the contract as a defense or bringing a breach of contract action against the other party. *See id.*

149. *See* UCITA cmt. 201(1).

150. UCITA § 203(1).

151. *See* UCITA cmt. 203(2).

152. *See id.*

153. *See* UCITA § 203(4)(A). This is UCITA's version of the "mailbox rule" used in traditional contract analysis. Once the acceptance is received by the offeror, the contract is formed and the contract is enforceable. *See id.*

new offer or unless the conduct of the parties establishes a contract.[154] The contract will be enforceable if the intent of the parties was to be bound to the contract even though the terms varied.[155] If there is a variance in a material term, then the contract was not formed.[156]

Under UCITA, an electronic authentication or transmission is attributed to a person if it was the act of the person or the person's electronic agent.[157] The party relying on the attribution of an electronic authentication or transmission has the burden of proving the attribution.[158] The effect of an electronic act attributed to a person is determined from the context at the time of its creation or execution, including the parties' agreement.[159]

While the E-Sign Bill and the Uniform Computer Information Transaction Act do not solve all of the major issues and concerns with contracting on the Web, they are initial steps in providing effective regulations on the Internet.

V. NCAA RULES REGARDING SPORTS AGENTS

The NCAA rules appear to be clear concerning an agent's relationship with a student-athlete.[160] However, as will be discussed below, the NCAA rules are unclear.[161] Furthermore, the agent's

154. *See* UCITA § 204(c)(1)(A)-(B). This section of UCITA follows the UCC § 2-207(1). *See* UCITA cmt. 204(2).

155. *See* UCITA cmt. 204(2). For the contract to be deemed enforceable, there must have been a definite intention by the parties to make a binding contract. *See id.*

156. *See id.*

157. *See* UCITA § 213(a). The Act is also attributed to a person if the person is bound by the Act under agency or any other law. *See id.* For example, if person "A" gives person "B" his online password, and person "B" makes a contract, the contract is attributed to person "A" by the actions of person "B" because assent was given by the act of giving out the password. *See* UCITA cmt. 213(2). However, if "B" steals "A's" password, then the actions by "B" are not attributed to "A" because "A" did not assent. *See id.*

158. *See* UCITA § 213(a). To fulfill this burden of proof, the party relying on the attribution can state that he or she was using a commercially accepted and reasonable method of attribution. *See* UCITA cmt. 213(3). This can be rebutted with evidence that the party neither had a role in the authentication nor allowed an electronic agent to form a contract. *See id.*

159. *See* UCITA § 213(c). This section of UCITA is similar to the UCC in that parties can rely on the acts of the other party during negotiations and while the contract is being completed. *See id.*

160. *See* NCAA, 2000-2001 NCAA DIVISION I MANUAL (2000) [hereinafter "NCAA MANUAL"]. The purpose of the NCAA Division I Manual is to govern the conduct of intercollegiate athletics and to help achieve the objectives of the Association. *See id.* § 2.01.

161. For a discussion of the NCAA rules, see *infra* notes 167-69 and accompanying text.

potential use of the Internet and e-mail potentially could blur the NCAA rules.[162]

According to the NCAA rules, an individual who loses amateur status is not eligible to compete in intercollegiate athletics.[163] One way for an individual to lose amateur status would be to enter into any agreement with a sports agent.[164] The NCAA rule provides that if an individual has ever agreed either orally or in writing to be represented by an agent for the purpose of marketing his or her athletic ability in that sport, that person is declared ineligible from competing in that NCAA sport.[165] Additionally, a student-athlete will lose amateur status if he or she enters into a contract, orally or in writing, with an agent for representation in future professional sports negotiations.[166]

The rules are clear that a student-athlete cannot make an oral or written contract with an agent. However, it is unclear as to what constitutes permissible contact between an agent and a student-ath-

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162. For a discussion of the use of the Internet regarding sports agents' contacts with collegiate athletes, see *infra* notes 170-76 and accompanying text.

163. *See* NCAA MANUAL, *supra* note 160, § 12.1.1 (listing six general actions which would cause student-athlete to lose amateur status).

164. *See id.* § 12.1.1(f). However, the NCAA Manual never defines the term "agent." *See id.* This potentially could cloud further the NCAA's hope of having clear rules concerning an agent's relationship with student-athletes. *See id.*

165. *See id.* § 12.3.1. The rule states:

> An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

Id.

166. *See id.* § 12.3.1.1. The rule states:

> An individual shall be ineligible per Bylaw 12.3.1 if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.

Id. Furthermore, student-athletes will be declared ineligible if they, their families or friends accept a benefit from a prospective agent. *See id.* § 12.3.1.2.

> An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from:
>
> (a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or
>
> (b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport.

Id.

lete. Following a strict reading of the NCAA rules, it appears as though an agent and a student-athlete may converse about anything other than a contract for future representation.[167] Additionally, the student-athlete is prohibited from accepting benefits or transportation from an agent.[168] This does not seem to make much sense. An agent and a student-athlete can meet and talk about almost anything for four months, and the student-athlete will not lose NCAA eligibility. Yet, if the agent gives the student-athlete a ride from the gymnasium to his or her dorm room, the athlete will lose eligibility.[169]

The NCAA rules do not discuss whether an agent is authorized to contact a student-athlete via the Internet or e-mail without jeopardizing the student's NCAA eligibility. It has been established that contracts can be made via the Internet and what jurisdiction would be applicable to that contract.[170] Therefore, common sense leads one to believe that a student-athlete who makes a contract over the Internet with an agent will lose eligibility in NCAA athletics.[171]

The question, therefore, becomes: What communication between an agent and a student-athlete is permissible via the Internet? May an agent and a student-athlete communicate over e-mail without jeopardizing the student-athlete's eligibility? It is clear from the language of UCITA and the E-Sign Bill that a contract can be formed by way of e-mail.[172] A strict reading of the NCAA rules would seem to allow any communication between an agent and a student-athlete until they make a contract for future representation.[173]

Another use of the Internet and the Web is the construction and use of a Web site. An agent could construct a Web site that would serve as an advertisement of his or her services and current

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167. For a further discussion of the NCAA rules regarding agent contact with a student-athlete, see *supra* notes 163-66 and accompanying text.

168. For a further discussion of the NCAA rules regarding benefits, see *supra* notes 163-66 and accompanying text.

169. For a further discussion of the NCAA rule regarding benefits from a prospective agent, see *supra* notes 163-66 and accompanying text.

170. For a comprehensive analysis of personal jurisdiction over the Internet, see *supra* notes 42-77 and accompanying text.

171. *See* NCAA MANUAL, *supra* note 160, § 12.3.1.2. However, the NCAA Manual does not discuss specifically making a contract over the Internet.

172. For further discussion regarding the E-Sign Bill and UCITA, see *supra* notes 117-59 and accompanying text.

173. *See* NCAA MANUAL, *supra* note 160, § 12.3.1. For further discussion of NCAA Bylaws 12.3.1 and 12.3.1.1, see *supra* notes 163-73 and accompanying text. Such communication between an agent and a student-athlete would be in writing. *See id.*

clientele in order to attract future players to represent. Student-athletes could then link onto the Web sites while they are surfing on the Internet. A strict reading of the NCAA rules would not consider this a violation.[174]

Both of these interactions, however, may be considered a violation of the NCAA rules.[175] There is a clear intent by the NCAA rules to limit direct unsupervised communication between an agent and a student-athlete.[176] It is very likely that the drafters of the NCAA rules did not consider the existence of the Internet, let alone the ability to make contracts through e-mail. In the subsequent NCAA rules, it is likely that there will have to be new bylaws that will directly cover communications between an agent and a student-athlete over the Internet and an agent's use of the Internet in setting up Web sites.

VI. CONCLUSION

As the technological age and regulations governing the Internet evolve, the law governing contracts made electronically will become less amorphous. The courts are beginning to apply traditional notions of personal jurisdiction to transactions occurring

174. *See* NCAA MANUAL, *supra* note 160, § 12.3.1. Because there is no direct communication between the agent and the student-athlete, no agreement could be reached. *See id.*

175. *See id.* § 12.3.4(f).

176. *See id.* Bylaw 12.3.4 provides:

It is permissible for an authorized institutional professional sports counseling panel to:

(a) Advise a student-athlete about a future professional career;

(b) Provide direction on securing a loan for the purpose of purchasing insurance against a debilitating injury;

(c) Review a proposed professional sports contract;

(d) Meet with the student-athlete and representatives of professional teams;

(e) Communicate directly (e.g., in-person, by mail or telephone) with representatives of a professional athletics team to assist in securing a try-out with that team for a student-athlete;

(f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete and by having direct communication with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players' association); and

(g) Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value (e.g., potential salary, draft status).

Id.

over the Internet.[177] In addition, as evidenced by congressional intent, the federal government is pushing towards having a uniform standard affecting e-commerce and e-contracts.[178] While Congress is enacting legislation affecting e-commerce and e-contracts, states are also enacting uniform legislation to assist in innovative forms of contracting.[179]

The NCAA, meanwhile, must update its own rules to determine what contact between sports agents and student-athletes via electronic media will be tolerated.[180] Subsequently, the NCAA must update its bylaws to accommodate such contact. In the meantime, the NCAA bylaws are unclear as to what electronic contact between the agent and the student-athlete is permitted. If sports agents are going to continue interacting with lucrative student-athletes, there must be a clear determination of the standards by which agents and athletes need to abide.

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177. For an intricate discussion of personal jurisdiction regarding transactions over the Internet, see *supra* notes 18-77 and accompanying text.

178. For an overview of the E-Sign bill, see *supra* notes 121-28 and accompanying text.

179. For an analysis of UCITA, see *supra* notes 129-59 and accompanying text.

180. For a review of the NCAA rules regarding contacts between sports agents and student-athletes, see *supra* notes 160-76.